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No. 208

Supreme Court of the United States

OCTOBER TERM, 1948

GULF COAST WESTERN OIL CO., INC.,
Petitioner and Appellant below,

VERSUS

M. E. TRAPP,
Respondent and Appellee below.

ANSWER BRIEF OF M. E. TRAPP, RESPONDENT AND APPELLEE BELOW TO PETITION FOR WRIT OF CERTIORARI

RAM MORRISON,
Attorney for M. E. Trapp, Appellee.

August, 1949.

VITERBACK TYPEWRITING CO., 12 SOUTH WALKER, OKLAHOMA CITY, OKLA., PH. 2-9780

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STATEMENT OF FACTS FROM THE RECORD

For the convenience of the Court, I will make a short statement of the record facts.

This action was commenced December 7, 1943 (R. 94). After several motions to make more definite were sustained by the trial court, the pleader reached a stage where it was unable or unwilling to further amend. To the Second Amended Petition, the trial court sustained a motion to dismiss for failure to state a cause of action (R. 101). This order was appealed to the United States Court of Appeals (10 C. C.). The opinion is officially reported in 165 Fed. (2d) 343. The United States Court of Appeals affirmed the trial court on its order of dismissal of the Second Amended Petition except as to paragraph numbered II (12), (13), (14), (15), (16), (17), (18) and (19). Said portion of the

petition was reinstated in the District Court on February 6, 1948, for further proceedings (R. 103). On February 19, 1948, the Appellee filed his Answer (R. 104). On February 26, 1948, Appellant filed an application to amend that portion of the petition reinstated by the order of the United States Court of Appeals (R. 44). On March 6, 1948, Appellee filed a motion to disallow the application and to strike the same from the files (R. 56). On May 21, 1948, the trial court entered an order sustaining the motion (R. 59). The trial court filed a memorandum opinion (R. 59). No petition for rehearing was filed, or appeal notice given within ninety days from the date of this order.

On July 12, 1948, a trial was had on the Paragraph II (12), (13), (14), (15), (16), (17), (18) and (19). The trial court's findings are at page 75. The judgment entered by the trial court on July 28, 1948, is at page 79.

On August 4, 1948, a motion for new trial was filed by the Appellant (R. 62). In said motion no complaint or error was alleged with respect to the trial on July 12, 1948. The only error complained of in the motion for new trial was an alleged error in the order of the trial court dated May 21, 1948.

In addition to the grounds stated in Appellee's motion (R. 44), the Appellee urged in the United States Court of Appeals, that the District Court's order of May 21, 1948, was a final order, and therefore the appeal of the Appellant to the United States Court of Appeals was not in time.

The United States Court of Appeals sustained the judgment of the trial court upon the grounds set out in Appellees' answer in paragraph numbered III (R. 111).

In the proposed amendment, to the reinstated paragraphs, the Appellant seeks to attack a judgment of the State District Court of Garvin County, by alleging that said judgment was obtained by fraud. The judgment roll shows that the state court had jurisdiction of the parties, jurisdiction of the subject matter and the power to enter the judgment. The Appellant seeks to prove dehors the record, that the general appearance and disclaimer filed by the attorney for the Appellant in that cause was not authorized. The judgment roll shows that a general appearance and disclaimer was filed by said attorney and the court's judgment recited (R. 54):

> "The Court further finds that Lon R. Stansbery, C. E. Witmer and the Farmers Mutual Royalty Syndicate, a corporation, have entered their general appearance in said cause and disclaimed any right, title, or interest in and to said real estate and premises, or any part thereof, and that W. W. Williams has entered a general appearance and filed an answer in said cause, and that each of said parties are in default of other or further pleading than above stated."

In the opinion of the United States Court of Appeals, affirming the judgment of the trial court, the Court held that said judgment was voidable. The Appellant contends that the judgment was "absolutely void." This is the only error assigned here.

ARGUMENT

In Appellant's brief, Appellant cites and relies on the case of *Street* v. *Dexter,* 182 Okla. 360, 77 Pac. (2d) 707. In the opinion the State Supreme Court cites and

quotes from *Griffin* v. *Galbraith*, 114 Okla. 208, 247 Pac. 339, and *Hatfield* v. *Lewis*, 110 Okla. 98, 236 Pac. 611, which cases are also cited by the Appellant in its brief before this Court. In *Street* v. *Dexter*, the Court quotes and approved this statement from Ruling Case Law, 2 R. C. L., page 235:

> "* * * Where an attorney at law appears for a defendant not served with process, the presumption is that he was authorized to do so; in other words, his appearance is *prima facie* evidence of his authority, * * * but when such authority is denied or properly put in issue, it is competent to rebut by proof any presumptions which may arise from such acts. If the attorney was without authority, then his acts could bind no one.
>
> "Where the court acquires jurisdiction of an action solely by the appearance of an attorney, the party for whom the appearance was made may deny the authority of such attorney, and if the appearance was unauthorized, may secure the vacation of the judgment, but the want of authority must be clearly made to appear, in order to warrant the court in vacating the judgment."

In *Myers* v. *Chamness*, 102 Okla. 131, 228 Pac. 988, the State Supreme Court held that a judgment rendered on an unauthorized appearance by attorneys, and without service of summons on the defendant is voidable.

A judgment is "void on its face" within the rule that a judgment void on its face may be vacated on motion at the term at which it was rendered, when it requires only inspection of the judgment roll to show its invalidity. *Steiner* v. *Smith*, 115 Okla. 205, 242 Pac. 207; *Cara-*

way v. *Overholser*, 182 Okla. 357, 77 Pac. (2d) 688; *American Exchange Corporation* v. *Lowry*, 178 Okla. 433, 63 Pac. (2d) 71.

Statutory provision that void judgment may be vacated at any time on motion applies only when judgment roll shows invalidity. *Crowther* v. *Schoonover*, 130 Okla. 249, 266 Pac. 777; *Bledsoe* v. *Green*, 138 Okla. 15, 280 Pac. 301; *Green* v. *Jones*, 147 Okla. 273, 296 Pac. 743; *Town of Watonga* v. *Crane Co.*, 189 Okla. 184, 114 Pac. (2d) 941.

CONCLUSION

It, therefore, appears that there is no merit to the contention of the Appellant in its application for a Writ of Certiorari before this Court.

Respectfully submitted,

RAM MORRISON,

Attorney for M. E. Trapp, Appellee.

August, 1949.